IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3272, 3273 & 3275 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AMBA PRASAD GOEL

Versus

STATE OF GUJARAT

Appearance:

MR BR GUPTA for Petitioners

MR.S.K.Patel, learned APP for Respondent No. 1

MR R.K.Golani for NM KAPADIA for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 05/09/2000

ORAL JUDGEMENT

1. The petitioners abovenamed have preferred these petitions under Sections 482 and 483 of the Criminal

Procedure Code, 1973 for quashing the Criminal Cases Nos. 1488 of 2000, 1367/2000 and 1361/2000 filed by the second respondent before the learned J.M.F.C., Vadodara for offence punishable under Section 138 of the Negotiable Instrument Act (for short "the said Act"). The second respondent contended before the learned J.M.F.C., Vadodara that the second respondent was a company registered and incorporated under the provisions of the Companies Act, 1956 and complainant being company is represented by its Authorized Executive Mr. Bhupendra Raj. It has also been contended that the accused company had issued certain cheques and the cheques were presented to the bank and the said cheques were dishonored by the said bank saying that there was no sufficient fund. Therefore, cheques were returned to the second respondent. The second respondent thereafter issued notices to the petitioners by R.P.A.D. which were received back, but notices which were issued under certificate of posting were not received back. Therefore, the second respondent took for granted that those notices have been served upon the petitioners and accordingly, the second respondent waited for sometime and thereafter, filed complaint against the petitioners before learned J.M.F.C, Vadodara.

2. Since these three matters involve common question of law and fact, they are being disposed of by this common judgment. In the first matter, the cheques were returned on the ground that the funds were insufficient and in two other matters, the cheques were dishonored on other grounds, but the facts remain that the cheques were dishonored in all three matters.

3. On receipt of the said complaint, the learned Magistrate recorded verification of the second respondent and thereafter, issued process of summons for the aforesaid offence against all the accused persons named in the complaint. Feeling aggrieved by the said order of issue of process of summons of the learned Magistrate, the petitioners have preferred these petitions under Sections 482 and 483 of the Criminal Procedure Code, 1973. It has been mainly contended here that no offence is made out and the petitioners are not responsible to answer the complaint of the second respondent in all the three matters and, therefore, the complaints in all the three matters are required to be quashed and set aside.

4. Mr. R.K.Golani appears on behalf of the contesting respondent and Mr. S.K.Patel, learned APP for State. I have heard the learned advocates for the parties and have perused the papers.

5. It has first been contended on behalf of the petitioners that it was necessary for the second respondent to allege as to in what capacity the complaint was filed by the second respondent. That as per the decision of this Court the complainant was required to show as to whether he was a payee or a holder in due course and the same has not been disclosed by the second respondent and therefore the complaint is required to be quashed and set aside. The learned advocate for the petitioner has relied upon the decision of this Court in the case of Dipendra G. Choksi & Anr. Vs. Kailashchandra C. Dhoot & Anr. reported in 1995 (1) GLR 424 in which this Court has construed the provisions of Section 138 and 142 of the said Act and thereafter, it has been observed that Court can take congnizance only if the complaint is filed in writing by the payee or holder in due course of the cheque. The aforesaid matter did not disclose the aforesaid position and therefore the application was allowed and the complaint was quashed and set aside. The aforesaid decision will not apply to the facts of this case before me. It is very clear that the second respondent has stated in the complaint itself that the petitioners had issued cheques to second respondent. This can be gathered from para-3 of the complaint wherein it has been positively mentioned that the accused persons had issued the cheques of the discription mentioned in the complaint to the complainant i.e. second respondent. Similar allegation has also been made at page-12 to the effect that said cheque was drawn by the first accused and the cheque was given by the accused persons to the complainant for making payment of goods supplied by the complainant to the accused persons on credit. In my view, these averments are sufficient for the purpose of making allegations in the complaint and no further allegations were required to be made in the complaint for the purpose of showing that the second respondent was drawee of the cheques in all the three matters.

5. It has then also been contended on behalf of the petitioner that there is no mention as to how the petitioners have been joined as accused persons. It has also been argued that the petitioners may be Directors of the company and they may not be responsible and liable for day to day affairs of the company and if they are not responsible or liable for day to day affairs of the company, they may not be criminally responsible and liable in the said complaint. That there is no averment or allegation showing that the petitioners were responsible for day to day affairs of the said company. That the complaint is silent and even verification is

found silent on the point. The learned advocate for the petitioner has submitted certified copy of the complaint which naturally contains verification of the second respondent recorded by learned J.M.F.C.,Vadodara while receiving the said complaint and issuing process. Now, it is true that in para -2 of the complaint the second respondent has stated that the accused no.2 being Chairman of the accused no.1, accused no.3 being Managing Director and Signatory of the cheques of accused no.1, accused nos. 4, 5 and 6 are Directors of the accused no.1 and therefore they are responsible for operation, management and financial transaction of accused no.1.

6. The learned advocate for the petitioners has argued that these are not sufficient averments for holding that the petitioners are criminally responsible in the aforesaid complaint. For this purpose, the learned advocate for the petitioner has relied upon the decision of the Hon'ble Apex Court in the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others reported in AIR 1983 SC 67, wherein it has been observed that there was no clear allegation against the Manager and Director that they were responsible for the conduct of the business and disputed sample. The said matter related to the offence under the Prevention of Food Adulteration Act and it was observed that so far as the Manager is concerned, he would be principally responsible and liable, but rest of the Directors of the company cannot be treated to be responsible and liable unless the allegations are made against them showing that they were responsible for the conduct of the business and of the disputed sample. Relying upon the said decision it has been submitted that there is no averment made in the complaint that the present petitioners are responsible and liable to answer the complaint of the second respondent in all the three matters. It has also been argued that so far the reference to the petitioners is concerned, they have been referred as Director, Managing Director, Signatory and Chairman and it has been alleged that since they are Director, Managing Director, Signatory and Chairman, they are responsible for the operation, management and financial transaction of first accused. That therefore there is no allegation or averment that the petitioners are responsible for day to day affairs of the said company.

7. Now, if we go through the complaint we may find taht in para-3 it has been mentioned that the accused persons have got business relations with the complainant. Therefore, second respondent included all the petitioners including company and all the directors of the company.

It is further alleged in para-3 of the complaint that the accused persons have purchased chemicals from the complainant. Again it has been alleged that the accused have been maintaining and running the account for the business transaction done with the complainant including the purchases made by the accused persons on credit from the complainant. It has also been mentioned that the accused persons have purchased chemicals goods on credit from the complainant as per the details given in the complaint. Therefore, time and again, the second respondent has referred all the petitioners as persons who have dealt with the transaction with the second respondent. In para -3 of the compliant it has been mentioned that towards the payment of the price of goods purchased by accused persons from the complainant, the accused persons gave the cheques of amount as per the descriptions in the complaint. Therefore, again there is a reference to all the petitioners with respect to issue of cheques in favour of the second respondent. At page -12 also there is a reference that the cheques were drawn by the first accused and the said cheques were given by the accused persons to the second respondent for making payment of goods supplied by the second respondent to the accused persons on credit. Then again it is mentioned that the complainant was legitimately and legally given the said cheques by the accused persons. It has also been stated in the complaint that the accused persons are liable to make the payment of amount of the said cheques given by the accused persons to the complainant against the goods supplied on credit by the complainant to the accused persons. Then again in para -6 it has been alleged that all the said cheques which were issued by the accused persons and given to the complainant in discharge of their liability have been dishonored for the factual reasons of insufficient funds in the bank account of the accused persons. Therefore, time and again the second respondent had made reference to all the accused persons showing that all of them issued cheques for purchase of goods and, therefore, all of them are responsible for the offence alleged in the complaint.

8. In the aforesaid view of the matter, it can be said that there is prima facie case of allegations against the petitioners and, therefore, it cannot be said that offences have not been made out against the present petitioners. It is, more so, when the second respondent has issued notices to all the petitioners and in the present petitions, it is nowhere stated that the notices issued to them under certificate of posting were not received by them. Then the petition is silent about the reply given by the petitioners to the said notices issued

to the petitioners by the second respondent.

9. It has then been contended that the cause of action would arise for offence under Section 138 of the said Act only when the notices have been served upon the accused persons and payment is not made within 15 days from the date of service of the said notice. That in the present cases, the notices have not been served and there is no allegation as to on what date the notice has been served. Therefore, the complaint is silent on the aforesaid aspects of the case and, therefore, the compliant is required to be quashed. Now, if we look into the allegations made in the complaint, it can be gathered from para -4 of the complaint at page -12 that the said cheques were presented in the concerned branch for payment but were returned unpaid by the banker with forwarding memo giving different reasons for not honouring the said cheques. It has further been stated in the complaint that the complainant was informed about the aforesaid event on 4.4.2000 by the bank. Then in para-7 it appears that thereafter, the complainant i.e. second respondent had given legal notice through their advocate on 7.4.2000 and they were sent by post on 7.4.2000 to the accused persons calling upon them to make the payment of the said cheques within 15 days from the date of receipt of these notices. That the said notices were sent to the accused persons through RPAD and under certificate of posting on 8.4.2000. That the notices were being issued to invoke the provisions of Sections 138 and 142 of the said Act in case the payment was not made. From para-8 it appears that the complainant had sent notices to all the accused persons at the registered address. The complaint further shows that six envelopes containing notices sent by the registered post were received back undelivered. Therefore, the second respondent has alleged that the accused persons deliberately avoided receipt of the said legal notices sent by the complainant through R.P.A.D. That the accused persons have willfully neglected to receive the notices of the complainant sent by RPAD as the same contained legal notices bearing the names of the complainant. In para-9 of the complaint it alleged that the accused persons have received the legal notices sent by the complainant post under postal certificate. That the accused persons were aware about the said legal notices sent by the complainant through RPAD and therefore, the accused persons deliberately avoided the service of notices sent by the complainant trough RPAD.

10. On this aspect of the case, the learned advocate for the petitioners has argued that there is no averment

or allegation made about the date of service of notice and, therefore, it cannot be said that complaints have been filed 15 days after service of notice as contemplated under Section 138 of the said Act. On this aspect of the case, the learned advocate for contesting respondent has relied upon the decision of this Court in the case of Satish J. Shah Vs. Pankaj Mashruwala and Another reported in 37 (2) GLR 751. There it has been observed as follows :

"As regards practice and procedure for service of notice through post and if the addressee endeavours to manage to see that the notice is returned with post remarks "not available in the house", "house locked", 'shop closed", the Apex Court in recent decision in the case of the State of madhya Pradesh Vs. hiralal & Ors. JT 1996 (1) SC 669 has held it to be a valid service on respondent - addressee. In light of this decision, the contention does not hold good as on facts also the prosecution case is on much sounder footing and the notice shall be deemed to have been served and much significance cannot be attributed to difference in signature"

While the said issue, he has also relied upon the decision of Hon'ble Supreme Court in the case of State of Madhya Pradesh Vs. Hiralal & Ors. reported in JT 1996 (1) 669 in which observations are made by the Hon'ble Apex Court in para -3 which are reproduced from the reported judgment as follows :

Para : 3

The controversy raised in this cae is covered by an order of this Court dated August 2, 1995 made in Civil Appeal arising out of SLP (C) No. 9048 of 1988. We have heard the counsel for the appellant and following the judgment passed by this court, we held that the respondents are not entitled to the benefit of the provisions of Land Acquisition Act, 1894, as amended by Act 68 of 1984. Instead, they are entitled to solatium at 15% and interest at 6% on the enhanced compensation from the date of taking possession till date of deposit.

This would mean that simply because the persons receiving the notice under certificate of posting or otherwise simply because the persons under the knowledge about the contents of the notice do not receive the

notices and allow the return the the notice without being served upon them, then it cannot be said that the notices have not been served at all. After all this will be a matter of fact and the second respondent may be at liberty to bring it to the notice of the trial court and the record of the court as to when the notices can be said to have been served upon the petitioners. It is more so when the petitioners have not come out with a case that they have never been served with the notices sent to them even under the certificate of posting.

11. We can refer to a decision in the case of K. Bhaskaran Vs. Bhaskaran V/s. Sankaran Vaidhyan Balan & Another reported in (1999) 7 SCC 510. There it has been observed that when notice is returned to unclaimed, the said date would be the commencing date in reckoning period of 15 days contemplated in Clause (c) to the proviso to Section 138 of the said Act. Of course, such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. In the present case the accused did not even attempt to discharge the said burden to rebut the aforesaid presumption. Therefore, again it may be a matter of fact and the same may be considered and decided by the trial court as and when the matter proceeds at the stage of evidence.

12. He has also relied upon the decision in the case of State of Maharashtra Vs. Inshwar Piraji Kalpatri reported in (1996) 1 SCC 542. There it has been observed that the power to quash the proceedings should be exercised only under extra ordinary circumstances.

13. He has relied upon the judgement of Andhra Pradesh High Court in the case of V. Satyanarayana Vs. Andhra Pradesh Travel and Tourism Development Corporation Ltd. and Another reported in 2000 DoCH 538. There it has been observed that when there is a complaint about dishonour of cheque challenged on the ground that notice of dishonour was not served on the drawer then whether notice had in fact been served or a false endorsement was secured from the postal authorities can be decided at trial stage and is no ground for quashing the proceedings. In the present case endorsements are there and the fact also remain that the notice has been simultaneously issued under certificate of posting. Therefore, parties are at liberty to deal with the said issue at the time when the trial proceeds.

14. He has also relied upon the decision in the case

of Bharat Barrel & Drum Manufacturing Co. Vs. Amin Chand Payrelal reported in (1999) 3 SCC 35. There is a reference to the presumption that promissory note was for consideration is rebuttable. This is again a matter to be discussed and disposed of as and when it arises at the stage of the trial before the trial court.

It has also been argued that the verification of the complainant in the complaint does not disclose that the petitioners are responsible and liable for the day to day affairs of the company and it has also not been alleged in the complaint that the complaint has been filed 15 days after service of notice. Now, different averments made in the complaint are not required to be reproduced. Therefore, if there is some lacuna in the verification of the complainant, the complaint cannot be quashed on that ground. Even in the judgement cited by the learned advocate for the petitioner it was found that the Manager being person incharge of the affairs would be deemed to be prima facie responsible and, therefore, the complaint against the manager was not quashed.

15. The learned advocate for the petitioner has also relied upon the decision in the case of Secunderabad Health Care Ltd. Vs. Secundarabed Hospitals Pvt. Ltd, reported in 1998(4) Crimes 74. There it has been observed that no specific allegations were made against the petitioner that at relevant time, they were incharge of and were responsible to company for conduct of its business. That there must be clear and specific allegation against persons that they were incharge and responsible to company in conduct of its business at the relevant time. That whole statement of complainant did not reveal against the petitioner. Therefore, proceedings against the petitioner were liable to be quashed and set aside. In the present case time and again the second respondent has alleged that all the petitioners had purchased the material and had issued cheuqes in all the three matters. Therefore, there was allegation in the complaint. Simply because the allegations in the complaint are not reproduced or repeated in verification, the complaint at this stage will not be liable to be quashed even if the said decision in the cae of the Andhra Pradesh High Court is accepted.

15. In the decision of Mahendra Pratap Singh Ratna and Another Vs. M/s. M.K.Metals and Another reported in 1999 (1) Crimes 181, it has been held that facts to hold such officer responsible for offence have to be pleaded in complaint as in absence it would not be permissible

for complainant to bring home the charge of vicarious liability. Again the second respondent has made necessary allegations in the complaint against all petitioners to above. Therefore, even this decision will not be applicable to the facts of the present case before me.

16. Another decision referred to and relied upon is in the case of M/s. Saketh Indian Ltd. and Another Vs. M/s. India Securities Ltd. reported in AIR 1999 SC 1090. There it has been laid down that the period of one month for filing the complaint under Section 138 against dishonour of cheque will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by drawer, expires. In para-5 of the said judgment it has further been observed that Section 142 of the Act provides that Court shall take cognizance of any offence punishable under Section 138 on a written complaint made by the payee or holder in due course, if such complaint is filed within one month of the date on which the cause of action arises. A month is to be reckoned according to the British Calendar as defined in the General Clauses Act.

As stated above this will be matter of fact because so far the postal acknowledgments are concerned, they are not signed by the addressee since they have not been delivered to the addressee. So far as the notices under the postal certificate are concerned, it would be again a matter of fact and evidence showing whether the said notices have been served upon the petitioners and if yes, the date on which the same have been served upon the petitioner. The Trial Court will be in a position of deal with the factual aspects of the material and evidence which may be placed before it. Therefore, this decision will not apply to the case before me.

17. In the aforesaid view of the matter I am of the decision that the complaint discloses the offence as indicated in the complaint and it cannot be said that the offences have not been made out. On a mere look at the complaint, I am of the opinion that the complaint cannot be quashed and set aside very lightly. The petitioner will be at liberty to take all the contentions at the stage of trial when the trial proceed in all these three matters. Mr. Patel, learned APP states that it cannot be said that the complaint as it stands does not disclose any offence against the petitioners. Therefore the complaint cannot be quashed.

18. In the aforesaid view of the matter these three petitions are without any merit and deserve to be dismissed and accordingly, all the three matters are ordered to be dismissed. Interim relief granted earlier by this Court stand vacated in these three matters. Rule is discharged with no order as to costs.

19. At this stage, learned advocate for the petitioner states that in all these three matters, the petitioners desire to file appropriate proceedings before the Hon'ble Supreme Court and, therefore, interim relief granted against further prosecution of the criminal complaint in all the three matters, may be continued for a period of six weeks. The learned advocate for the contesting respondent states that the interim relief was not granted at earlier stage, but it was granted at a late stage when he applied for time. Any way, interim relief is in existence as on today, therefore, with a view to provide an opportunity to the petitioners, interim relief is ordered to be continued for a period of six weeks from today.

Direct service is permitted.

(D.P.Buch,J)

(vipul)